Petition

81-1344

NO.

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In the

Supreme Court of the United States

October Term, 1981

In the Matter of
HARTFORD TEXTILE CORPORATION,
OXFORD CHEMICALS, INC.
WELLINGTON PRINT WORKS, INC.,
Debtors.

ROSE SHUFFMAN, As Executrix of
the Estate of OSCAR SHUFFMAN, Deceased,
Petitioner,

—against—

HARTFORD TEXTILE CORPORATION,
OXFORD CHEMICALS, INC.
WELLINGTON PRINT WORKS, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether under Pepper v. Litton, 308 U.S. 295 (1939); Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (1944); and Bryant v. Carleson, 444 F.2d 353 (C.A.Cal., 1971), cert.denied 404 U.S. 967(1971)the Supreme Court will take judicial notice of events subsequent to the filing of the appeal, to wit, the debtor-in-possessions' change of facts in its most recent Chapter 11's, which "new" facts contradict the findings upon which the Opinion below is based, and vacate and reverse an order based upon the debtor-in-possessions' "fraud on the Court" in order to prevent a fraud and an injustice?

2. Whether under Richmond-Carcia Oil Co. v. Coates, 17 F.2d 262; Oil Trading Associates, Inc. v. Texas City Refining, Inc. 303 F.2d 713 (2nd Cir., 1962); Frederick Zittel & Sons v. Schwartz, 192 A.D. 353 (N.Y. App.Div., 1920) and 3A Corbin on Contracts, 1963 Ed., Sec. 768-770,1277, a new contract between two parties which simply cuts out a broker while performance is still due under the original contract constitutes a fraud on the broker, entitling him to his full commission?

3. Whether, under Rule 19 of the Rules of the Supreme Court the United States Supreme Court will grant certiorari as an exercise of its powers of supervision in a case in which prominent jurists and respected members of the media have called into question and otherwise challenged the integrity and honest of the administration of justice as a result of a consistent pattern of simple legal and factual errors which taken as a whole, constitute a

radical departure from the accepted and usual course of judicial proceedings?

4. Whether, under Pepper v. Litton, 308 U.S. 295 (1939) and Hazel-Atlas Glass Co.v. Hartford Empire Co, 322 U.S. 238 (1944), this Court will exercise its extraordinary Rule 19 powers of supervision and vacate and reverse its denial of the Petition for a Writ of Certiorari in the original Hartford Textile Corporation, et al. related Petition, 444 U.S. reh. denied, 444 U.S. 975 (1979), for "fraud on the Court" and in order to correct a fraud and an injustice?

5. Whether, under Brown v. Board of Education, 344 U.S. 1 (1952) and Putnam v. Day 89 U.S. 60 (1874), the Supreme Court will take judicial notice of the original Notice of Appeal to the District Court, reprinted at Appendix A-29, infra, which establishes as a matter of law the error of the District Court and Court of Appeal's in denominating of the appeal as being taken from a denial of reconsideration and rehearing only, requiring reversal?

6. Whether, under Pepper v. Litton, 308 U.S. 295 (1939); Bank of Marin v. England, 385 U.S. 99, 103 (1966); Bankruptcy Rule 515, and 11 U.S.C. §350, the Bankruptcy Court, as a Court of Equity, has continuing jurisdiction, especially in a case which has not been closed, to administer concealed assets which have been deliberately omitted from a debtor-in-possession's Statements and Schedules?

7. Whether, under Bryant v. Carleson, 444 F.2d 353 (C.A.Cal., 1971) cert. denied, 404 U.S. 967 (1971), the Supreme Court will take judicial notice of events since the filing of the appeal below, specifically the debtor-in-possession $150,000 offer to minority shareholders to settle their claims being pressed in the new Chapter 11's, rendering the Opinion below clearly erroneous as a matter of law, requiring reversal?

8. Whether, under Article III of the Constitution and the 5th Amendment thereof, the Petitioner was denied "due process" of law by the Court of Appeals' failure to address the issue of whether a receiver should be appointed to administer concealed assets, predicated upon the Court's clearly erroneous belief that it had alaready addressed that question in its Opinion reported at 613 F.2d 384 (1979), cert. denied 447 U.S. 907 (1980), wherein the issue was whether attorneys' fees in a Chapter XI may be revoked Post-Confirmation for "fraud on the Court"?

9. Whether, under Brown v. Board of Education, 344 U.S. 1 (1952), the Supreme Court must take judicial notice of the fact that the orders for sanctions and contempt against Petitioner's counsel referred to in the Opinion below were reversed upon appeal to the District Court, so that he assessment of $5,000.00 in damages pursuant to Rule 38 of the Federal Rules of Appellate Procedure and double costs pursuant to 28 U.S.C. § 1912 by the Court below against Petitioner's counsel constituted a clear abuse of discretion, requiring reversal?

10. Whether, under Case v. Los Angeles Lumber Co., 308 U.S. 106 (1939); Putnam v. Day 89 U.S. 60 (1874); Chicago Deposit Vault Co. v. McNulta, 135 U.S. 554 (1893); and 31 Corpus Juris Secumdum § 1-5, 117-120, the Court of Appeals should be judicially estopped from assessing damages and costs against Petitioner's counsel, who was assured by the Departmental Disciplinary Committee of the Supreme Court, State of New York, Appellate Division, while acting as the agent for the Court of Appeals when dismissing the Second Circuit's complaint against counsel which was referred to it for investigation, that no further liability or penalties would accrue as a result of continued filings seeking to reverse the fraud and injustice arising from the debtor-in-possessions' "fraud on the Court", thereby requiring reversal of the damage award and costs?

11. Whether, under the First Amendment to the Constitution of the United States, the imposition of damages pursuant to Rule 38 of the Federal Rules of Appellate Procedure and double costs pursuant to 28 U.S.C. § 1912 (1976) against Petitioner's counsel in the first instance, in the case at bar, constitues an infringement of an attorneys' First Amendment guarantees of freedom of speech and expression, and Petitioner's 6th Amendment right to counsel, requiring reversal?

PARTIES

The parties in the United States Court of Appeals were the Petitioner, Rose Shuffman, As Executrix of the Estate of Oscar Shuffman, Deceased and Hartford Textile Corporation, Oxford Chemicals, Inc. and Wellington Print Works, Inc.

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In The

SUPREME COURT OF THE UNITED STATES

October Term 1981

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In the Matter of
HARTFORD TEXTILE CORPORATION,
OXFORD CHEMICALS, INC.
WELLINGTON PRINT WORKS, INC.,

Debtors.
----------x

ROSE SHUFFMAN, As Executrix of
The Estate of OSCAR SHUFFMAN,
Deceased,

Petitioner,

-against-

HARTFORD TEXTILE CORPORATION,
OXFORD CHEMICALS, INC.,
WELLINGTON PRINT WORKS, INC.,

Respondents.
----------x

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

The petitioner* prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Second Circuit, entered September 16, 1981.

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*As used herein, "Petitioner" refers to both Rose Shuffman, as Executrix of the Estate of Oscar Shuffman, Deceased and the late Oscar Shuffman.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Second Circuit (Appendix A-1 , infra), is reported at 659 F.2d 299 (1981).

JURISDICTION

The Order of the United States Court of Appeals for the Second Circuit was entered on September 16, 1981. The order of the United States Court of Appeals for the Second Circuit denying the Petition for Rehearing En Banc was entered on October 20, 1981, and is reprinted at Appendix A-24, infra.

The Memorandum and Order of the United States District Court (Sofaer, J.) dated January 20, 1981 is reprinted at Appendix A-26, infra.

The Order of the Bankruptcy Court (Babitt, J.) dated November 14, 1979 denying Petitioner's oral Application for the Appointment of a Receiver is contained within the transcript of the hearing held on November 14, 1981, which is reprinted in pertinent part at Appendix A-28, infra.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution guarantees of freedom of speech and expression are involved here, as are the Sixth Amendment right to counsel.

The Fifth Amendment of the United States Constitution, Due Process Clause, is also involved, as is Article III of the Constitution in as much as it provides for the adjudication of cases and controversies.

Rule 19 of the Rules of the Supreme Court as it pertains to supervisory authority is involved herein, as are Rule 38 of the Rules of Appellate Procedure and 28 U.S.C. §1912 (1976).

Other statutory provisions, made pertinent by the Opinion below, are the Bankruptcy Act §301 et. seq., 367, 11 U.S.C.A. §701 et. seq. 767 and Bankruptcy Code 11 U.S.C.A. §1141 (a), 11 U.S.C.A. §350 and Bankruptcy Rule 515.

STATEMENT OF THE CASE

The facts underlying the original Shuffman-Hartford dispute have a long, tortuous, and convoluted history, with many of the true facts only recently coming to light as a result of The Hartford Corporation's and Wellington Print Works, Inc.'s second round of Chapter 11's in less than six years.[1] For the sake of clarity and brevity, the facts are presented here in two parts.

Part I contains the facts as they pertain to the Opinion below for which review is sought herein, including the operative facts resulting in the District Court's January 20, 1981 Memorandum and Order and the Bankruptcy Court's Order of November 14, 1979.

Part II contains newly discovered or recently discovered facts which have just come to light as a result of The Hartford Corporation and Wellington Print Works, Inc. newest round of Chapter 11's. These facts, gleaned from Hartford's books and records, contradict the original findings of the various Courts made to date upon which the Court

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[1]For a discussion and history of the facts of the original Shuffman-Hartford dispute, this Honorable Court's specific attention is invited to the Statement of Facts in Petitioner's prior Petition for a Writ of Certiorari, cert. denied, 444 U.S. 870, reh. denied, 444 U.S. 975 (1979), or in any of the other Hartford related Petitions or Motions recited in Footnote 15 of the Court of Appeals Opinion for which review is sought herein.

of Appeals predicated its Order for which review is sought herein, and upon which this Court based its denials of certiorari in the aforementioned Petition for Writs of Certiorari and Motion for Leave to File A Petition for A Writ of Mandamus.

Those original findings, made as they were in the absence of an evidentiary hearing, were based upon the representations, or misrepresentations, of Respondents and their counsel. These new facts, or recently discovered facts, conclusively show that the Bankruptcy Court did in fact take and exercise Post-Confirmation jurisdiction in awarding Petitioner $3,346.71 in commissions earned after the date of Confirmation and Discharge in the original Chapter XI's, a fact which the Court below described in its Opinion below thusly:

> 6. Referring to the $3,346.71 in additional commissions paid to appellant during the Chapter XI arrangement for deliveries of vinyl pursuant to a settlement agreement following cancellation of the original Hartford Textile-Rudd Plastic Fabrics contract. This was fully explored in our decision of December 6, 1978. 588 F.2d at 874-75. There is nothing whatsoever in the payment of the $3,346.71 in additional commissions which even remotely supports Shuffman's fanciful claim of "post-confirmation jurisdiction. (Underscoring provided).

FACTS (PART I)

On July 3, 1973, Respondents Hartford Textile Corporation, Oxford Chemicals, Inc. and Wellington Print Works, Inc.,[2] all filed Petitions Under Chapter XI of the Bankruptcy Act.

On or about August 27, 1973, Respondents filed the required Schedules and Statements, together with the Rule XI-2 Affidavit of Robert Magid, their President. Magid's Affidavit on behalf of Respondent Hartford stated:

> 5. The following action has been commenced against the debtor, but the debtor's time in which to answer the complaint therein has not yet expired:
>
> > Ampacet Corp. v. Oxford Chemicals, Inc., et al., Supreme Court of the State of New York; judgment of $66,799.48 sought for goods sold and delivered:
>
> In addition, another purported creditor of the debtor, Rudd Plastic Fabrics Corp., has threatened to commence an action in connection

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[2]As used herein, "Respondents" refers to Hartford Textile Corporation, Oxford Chemicals, Inc. and Wellington Print Works, Inc.

with Hartford's alleged breach of contract, seeking damages and the sum of $32,601.74 for goods sold and delivered. Upon information and belief, however, Hartford not only has a valid defense to said action but also has a counterclaim for breach of contract. To the best of deponent's knowledge, information and belief, there are no judgments or other actions pending or threatened against the debtor or its property.

Magid's Rule XI-2 Affidavit on behalf of Respondent Wellington Print Works, Inc., stated:

5. No actions have been commenced against the debtor or its property. A purported creditor of the debtor, however, Rudd Plastic Fabrics Corp., has threatened to commence an action in connection with Wellington's alleged breach of contract, seeking damages and the sum of $32,601.74 for goods sold and delivered. Upon information and belief, Wellington not only has a valid defense to said action but also has a counterclaim for breach of contract. There are no judgments pending or threatened against the debtor or its property.

Magid's Rule XI-2 affidavits omitted all reference to four lawsuits pending against the debtors and their officers. Those four lawsuits, started by Robert Magid's brothers and sister, (Supreme Court, New York County, Index Nos. 2162/65, 3528/65, 7443/65 and 9400/65) charged the corporate officers with fraud, mismanagement, conversion and waste. Significantly one of those actions was a stockholders' derivative action.

Reference to those lawsuits was never once made during the course of the original Chapter XI's.[3] In addition, the minority shareholders were never given notice of the filing of the Chapter XI petitions.

On November 14, 1979 and before the new Petitions were filed, Petitioner made an oral Application to the Bankruptcy Judge in the original Chapter XI cases for the appointment of a receiver to pursue concealed assets, to wit the stockholders' derivative action and other monies alleged to be improperly converted. The hearing had originally been scheduled on a Motion of a Representative of the minority shareholders for, inter alia, disqualification of Respondents' counsel and the imposition of sanctions for fraud, misconduct, etc.

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[3] Respondents have, however, listed those lawsuits in their most recent Chapter 11's. In addition, they have offered the minority shareholders $150,000.00 to settle the claims contained in those suits in order to resolve the same claims which have been filed by the minority shareholders in the new Chapter 11's. The settlement provides for the possibility of the sale of Respondent corporations, in which case the $150,000.00 figure may be increased substantially.

Both the Motion of the Representative of the minority shareholders and Petitioner's Application for the Appointment of a Receiver were denied on the Record for what the Bankruptcy Court held was a lack of jurisdiction Post-Confirmation to do anything. Motions to rehear and reargue were thereafter denied, on the same ground.

On January 20, 1981, the District Court (Sofaer, J.) issued a Memorandum and Order dismissing Petitioner's appeal from the Order of the Bankruptcy Court (Babitt, J.) which denied Petitioner's Application for the Appointment of a Receiver to administer the concealed assets in Hartford's original Chapter XI's.

The District Court's Memorandum and Order stated, in pertinent part, as follows:

> This appeal is from a ruling of Bankruptcy Judge Babitt denying a motion to reconsider his denial of an oral application for the appointment of a receiver. (Emphasis added)

The original Notice of Appeal to the District Court, however, made clear that Petitioner was appealing from the Bankruptcy Court's original Order denying the Application for the Appointment of a Receiver, etc. The pertinent part of the original Notice of Appeal to the District Court reads as follows:

> ROSE SHUFFMAN, as Executrix of the Estate of OSCAR SHUFFMAN, the Appellent, Appeals to the District Court from the Order dated

November 14, 1979, by the HON. ROY BABITT, Bankruptcy Judge, denying her Application for the Appointment of Receiver.... (Emphasis added) [4]

On September 16, 1981, the Court of Appeals affirmed the District Court's January 20, 1981 Memorandum and Order in a Per Curiam Opinion of Judges William H. Timbers, Leonard P. Moore and Thomas Meskill. The Court of Appeals predicated its affirmance on the single issue as to whether or not an order denying reargument was an appealable order, which the Court held was not. The Court also awarded $5,000.00 in damages and double costs to Respondents assessed against David K. Shuffman, individually and as attorney for Rose Shuffman, As Executrix, etc., the Petitioner.

Petitioner's Petition for Rehearing En Banc was denied on October 20, 1981, despite Petitioner's argument to the Court that it, and the District Court, had erred in classifying Petitioner's appeal as being an appeal from a denial of reargument and reconsideration only, when the Notice of Appeal, quoted earlier and reprinted, infra, specifically recited the Bankruptcy Court's original November 14, 1979 Order as being appealed from. Other arguments

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[4] The entire Notice of Appeal to the District Court, dated January 17, 1980, is reprinted at Appendix A-29 , infra.

advanced by Petitioner, supported by documentary evidence conclusively establishing the fact that the Bankruptcy Court had in fact taken and exercised Post-Confirmation jurisdiction in making its amended findings and award of $3,346.17 in commissions earned on deliveries made after the date of Confirmation and Discharge, and further establishing Respondent's "fraud on the Court" which resulted in the erroneous affirmances predicated upon the various Courts' reliance upon the Respondents' fraud and representations to the contrary, were similarly rejected.

FACTS (PART II)

On July 14, 1980, The Hartford Corporation, which had been merged in 1976 with Oxford Chemicals, Inc., without a meeting of shareholders or vote thereby, creating a new entity entitled The Hartford Corporation, with Oxford Chemicals as a division, filed a Petition for relief under Chapter 11 of Title 11 of the United States Code. Two weeks thereafter, on July 28, 1980, The Hartford Corporation was joined by Wellington Print Works, Inc., which also filed for Chapter 11 status. These new Chapter 11's came less than six years after Hartford, Oxford and Wellington's Confirmation and Discharge in their prior Chapter 11's before Bankruptcy Judge Roy Babitt on September 5, 1974.

Petitioner herein filed a claim in those proceedings, seeking, inter alia, payment of $3,346.71 volunteered by the debtors and ordered paid by Bankruptcy Judge Roy Babitt in his Amended Order dated August 26, 1977. Those monies represented commissions earned on deliveries made by Rudd Plastic Fabrics Corp. to the debtors after the date of Confirmation and Discharge on September 5, 1974 pursuant to a previously Court-approved Compromise Agreement to Resolve a Dispute with Rudd.

The "amended findings" incorporated into the Amended Order made by the Bankruptcy Judge were that the late Oscar Shuffman had entered into a "new" Post-Petition finders fee contract with the debtors. The original Opinion had held that the "simple fact" was that there was no contract between

Shuffman and the Respondent-debtors Post-Petition. While Petitioner always denied that a "new" contract was entered, the Respondents, who first denied the existence of any contract or liability, then changed their position to claim a "new" Post-Petition finder's fee agreement with Petitioner, when confronted with copies of checks showing voluntary payments to Petitioner up until the date of Confirmation and Discharge.

This resulted in the original Bankruptcy Judge's Amended Order. Respondents have since changed their position in the new Chapter 11's to claim that there was no new contract, and that the voluntary payments made during the original Chapter XI's up until the date of Confirmation were made out of the "goodness of their hearts". Respondents, based upon the Amended Order, were able to avoid payment of approximately $80,000 still due under Petitioner's original contract, which was never repudiated.

During the argument of a Motion to Rehear the subsequent Order affirming the original Bankruptcy Court's Amended Order, the District Court (Brieant, J.), expressed his understanding of what he thought the Bankruptcy Court's Amended Order had provided for thusly:

> THE COURT: That might all be true. But I don't think it would alter the result here, and of course you are appealing from a result, you are not appealing from some dictum that the bankruptcy court said on the record.

Your grievance, if you have one, is with the result of the order of the bankruptcy court, and as I read it, whether he is right or wrong, as to whether or not it determined pre-filing of at filing or post-filing, the decedent's estate has been or will be paid under the plan for everything that was delivered prior to filing, and will be paid under the subsequent order made by the bankruptcy judge for every bit of goods delivered by Rudd between filing and discharge or confirmation of the plan, if you want to call it that.

Now if anything was delivered after the confirmation of the plan, this debtor has walked out of the courthouse on the day of confirmation of his plan, and he is now sui juris, he can be sued by you, as you should, in the State Court or any place you can catch him, and I don't see that it's error in result.

Assuming the bankruptcy judge was wrong on his factual statement as to when it ended, and I legally think if you disagree with me on that, Mr. Shuffman, and we have such a fundamental disagreement on the legal point involved here that you might as well take your appeal. (Underscoring provided); (Transcript, March 28, 1978 at 9).

...

THE COURT: The debtor acted improperly and you had to live with what he did.

MR. ZIRINSKY: We certainly did not -- nothing more to say on that point, your Honor.

> The only other point I want to make, your Honor, is the fact that the Court's decision is absolutely correct. (Transcript, March 28, 1978 at 22) (Underscoring provided)

The Court of Appeals, in its affirmance of the District Court's Order, repeated and reaffirmed the District Court's erroneous interpretation of what it thought it was approving, but was in fact not, after further assurances from the Respondents' counsel that the lower Courts' Opinions were correct, and that no jurisdiction was taken for the Post-Confirmation period. The Court of Appeals further specifically held that Petitioner could not be paid by the Bankruptcy Court or the appellate courts for monies earned after September 5, 1974, the date of confirmation and discharge, in the original Chapter XI's, as the Courts were supposed to have lost all jurisdication to order further payments as of that date. The Court of Appeals affirmance, reported at 588 F.2d. 872 (1978), cert. denied 444 U.S. 870, reh. denied, 444 U.S. 875 (1979), specifically held as follows:

> Equally unfounded is appellant's contention that the bankruptcy judge erred in denying priority status to her claim for commissions as an administration expense. The record established that appellant has received payment in full on all deliveries made by Rudd to Hartford during the period of arrangement. If appellant believes that she has not

> received commissions due her on deliveries made thereafter, her remedy lies not in the bankruptcy court nor on this appeal, but in a plenary action at law. See In re Gordon, 44 F.Supp. 581 (S.D.N.Y. 1942); 9 Collier on Bankruptcy ¶¶ 8.11, 8.12 (14th ed. 1975). (Underscoring provided)

Thereafter, and in response to a multitude of motions, arguments and appeals filed by the Petitioner seeking to inform the Court of its errors in an effort to have the Orders overturned, and more specifically to advise the Courts that they had in fact done that which they specifically said they could not and would not do, Respondents, by their counsel, continued to insist that jurisdiction ceased upon confirmation and discharge on September 5, 1974, and that no jurisdiction was exercised or monies ordered paid for the Post-Confirmation period.

However, in the new Chapter 11's, the Respondents sought to bar Petitioner herein, by claiming that she lacked standing as a creditor by virtue of Bankruptcy Judge Babitt's Amended Order which encompassed the $3,346.71 ordered paid under the earlier Court-approved Compromise agreement. The Respondents were forced to show the derivation of the $3,346.71 after the new Bankruptcy Judge, Edward J. Ryan, expressed his inability to comprehend the contradictions in the affirmances of the original Bankruptcy Judge's Amended Order.

On April 30, 1981, at a hearing held before Bankruptcy Judge Ryan in connection with Respondents'

challenge to Petitioner's creditor status, the following exchange evidencing the Bankruptcy Judge's confusion took place:

> MR. SHUFFMAN: Very simply, your Honor, that my client has standing as a creditor in the New Hartford Chapter XI via $3,346.17 which is owing to my client for post-confirmation deliveries by Rudd Plastic Fabric Corp. to Hartford Corporation. I do --
>
> THE COURT: Will you read that back.
>
> (The record was read.)
>
> THE COURT: Standing as a creditor is the issue that I have to decide; but after the words "Standing as a creditor," let me ask you, Mr. Zirinsky and counsel for the Committee, is there any question that as a result of post-first confirmation order services the estate of Oscar Shuffman is owed that sum of money?
>
> MR. ZIRINSKY: It's not a question of post-confirmation services. The commissions referred to arise out of a contract which was entered into between Hartford and Rudd during the pendency of the Chapter XI case.
>
> THE COURT: I am not carping for the sake of carping.
>
> MR. ZIRINSKY: There were no services rendered.

THE COURT: Just a minute. A record was made on your prima facie case.

MR. ZIRINSKY: Correct.

THE COURT: You have the exhibits I assume.

MR. ZIRINSKY: We have all the exhibits, your Honor.

THE COURT: I do not have, and I did not have, copies of those exhibits. I examined every one of them carefully as the case came in other than the two or three inches of tissue. I had an opportunity to read the Court of Appeal decision. In some way, which is still not clear to me, a court order was entered apparently directing that the sum be paid to the estate after the order of confirmation. Is this true?

MR. ZIRINSKY: Correct, your Honor.

THE COURT: Well, please, I'm going to ask you to get a record together so that if an Appellate Court has to review this, they will know exactly what we are talking about. (Underscoring provided)

Respondent Hartford's confirmation and discharge in the 1973 Chapter XI case occurred on September 5, 1974. The exhibits referred to by Bankruptcy Judge Ryan, Hartford's Commission Summary and Monthly Statements for the months of September, October,

November and December, 1974, conclusively prove that the $3,346.17 ordered paid by Bankruptcy Judge Babitt's Amended Order of August 26, 1977, and erroneously affirmed on appeal, were for Post-Confirmation commissions earned on Post-Confirmation deliveries.

Further confirmation of the fact that the $3,346.17 represented commissions earned after Confirmation and Discharge is contained in the debtors proposed Findings of Fact, Conclusions of Law and Order submitted to Bankruptcy Judge Ryan. The pertinent provisions of the Respondent's Order ousting Rose Shuffman, As Executrix, etc., as a creditor in the new Chapter 11's read as follows:

> ORDERED, ADJUDGED, DECREED, FOUND AND DETERMINED, as follows:
>
> 1. The claims asserted by Shuffman in the Hartford Claims and the Wellington Claims are as follows:
>
> (a) $43.27 Prior to July 3, 1973 (Possible Priority)
>
> (b) $3,346.17 from September 5, 1974 --- December 31, 1974 (Possible priority) (Underscoring provided)
>
> (c) Approximately $75-77 Thousand from January 1, 1975 (Possible priority)

(d) Pro rata share of stockholders' derivative action which was deliberately omitted from Statements and Schedules in Case Nos. 73 B 674-676 (Possible priority)

(e) 2-3/4% of total cost of all merchandise purchased from Rudd Plastic Fabrics Corp. on all Orders placed up to and including September 14, 1976 (Possible priority)

(f) $5.85 Pro rata distribution of net profits for two years from September 5, 1974, plus interest

(g) $3,000.00 on uncashed checks given to Oscar Shuffman prior to July 3, 1973, plus any other moniew (sic) similarly represented by uncashed commission checks (Possible priority)

2. The claims described in items (a) and (f) of paragraph 1 hereof, represent distributions to be made in accordance with the consolidated Chapter XI plan, on Shuffman's general unsecured claim as allowed by the Bankruptcy Court, in the prior consolidated Chapter XI cases confirmed by the Bankruptcy Court on September 5, 1974, In re Hartford Textile Corporation, Oxford Chemicals, Inc. and Wellington Print Works, Inc. (S.D. N.Y., Arrangement Nos. 73 B 674-676, inclusive) (the "Prior Chapter XI Cases").

> 3. The claim described in item (b) of Paragraph 1 hereof, is that amount which is stated by Hartford Textile Corporation to be owing to Shuffman, based upon commissions to be paid to Shuffman under a certain agreement with Rudd Plastic Fabrics Corp. dated November 2, 1973, and which amount was incorporated in the Bankruptcy Court's amended order dated August 26, 1977 in the Prior Chapter XI Cases. (Underscoring provided)

Based upon the Commission Summary and Statements, however, Rudd did not fully perform under the terms and conditions of the Bankruptcy Court-approved Compromise Agreement. Rather than insist upon full performance under the terms of the Compromise Agreement, or, in the alternative, insist upon renewed performance of the original agreements with Rudd, which would have greatly benefited the debtors and the creditors under their previous Plan of Arrangement, the Respondents simply entered into yet another "new" contract with Rudd. This "new" agreement with Rudd had the same impact as the Court-approved Compromise of 1973, in that all it did was cut out Petitioner and denied her the remaining brokerage commissions she was entitled to even under the terms of the "new" agreement the Respondents belatedly claimed to have entered into with her late husband. Again, it was the Respondents belated claim of this "new" agreement which forced the Bankruptcy Court to enter its Amended Order of August 26, 1977, which Amended Order had the effect of cancelling Petitioner's original contract with the Respondents.

What is obvious from those new documents is that the Bankruptcy Judge, Roy Babitt, did in fact take and did in fact exercise Post-Confirmation jurisdiction in ordering the $3,346.71 in commissions paid for the deliveries made Post-Confirmation, contrary to the repeated representations of the Respondents and the pronouncements of the various Courts to the contrary. As stated previously, on September 16, 1981, the Second Circuit, in the Per Curiam Opinion and Order for which review is sought, and in which Petitioner's counsel was fined $5,000.00 in damages, was once again induced to repeat the error thusly:

> Referring to the $3,346.17 in additional commissions paid to appellant during the Chapter XI arrangement for deliveries of vinyl pursuant to a settlement agreement following cancellation of the original Hartford Textile-Rudd Plastic Fabrics contract. This was fully explored in our decision of December 6, 1978, 588 F.2d at 874-75. There is nothing whatsoever in the payment of the $3,346.17 in additional commissions which even remotely supports Shuffman's fanciful claim of "post-confirmation jurisdiction." (Underscoring provided).

The documentary evidence introduced as exhibits by the Respondents, as aforesaid, conclusively established that the $3,346.71 was in fact earned as commissions on deliveries made Post-Confirmation. This $3,346.71 was ordered paid

to Petitioner on top of and in addition to the $7,432.73 which the Respondents voluntarily paid to the late Oscar Shuffman during the original Chapter XI's, and which they at first denied owing, resulting in the Bankruptcy Court's original July 20, 1977 Order, which the Court was forced to amend.

A recently discovered Inter-Office Memorandum signed by the Respondents' Comptroller and initialed by its President, dated several weeks after the September 5, 1974 confirmation and discharge, and summarizing a conversation with their attorney, shows that the Respondents were aware of their continuing contractual liability to Petitioner but nevertheless stopped making the payment of the $3,346.71 in Post-Confirmation commissions on the advice of counsel. Later, this same attorney, with full knowledge of the Respondents' contractual relationship with Petitioner, successfully represented the Respondents in the Bankruptcy Court on their knowingly false claim that they had no contract and therefore owed no money to the Petitioner. Specifically, the Bankruptcy Court originally held:

> The simple fact is that there was no post-petition agreement between claimant and the debtor-in-possession and there cannot be a priority claim arising from a contractual position without a contract. (Opinion, June 1, 1977) (Underscoring provided).

It was this "simple fact" which the Bankruptcy Court was later forced to amend by the Amended Order dated August 26, 1977, in the face of Petitioner's documentary evidence that the $7,432.73 had been voluntarily paid during the Chapter XI's. Rather than hold another evidentiary hearing, however, the Bankruptcy Court simply permitted Respondents' counsel to change the story and the facts to assert that a "new" finder's fee contract had been entered with the late Oscar Shuffman, rather than awarding full payment of the additional $75-77 thousand due on the remaining years of the multi-year contract which both Petitioner and Respondent had previously agreed was the only contract they had ever entered into covering the Respondents' purchases from Rudd.

It should also be noted that Respondents listed the contract with Rudd as an ongoing executory contract in their Statement of Executory Contracts filed on August 27, 1973, but failed to list their contract with Petitioner. When Respondents initiated the litigation against Petitioner in the original Chapter XI's to avoid payment of their obligations to Petitioner under her contract, they represented to the Bankruptcy Courts, and to the reviewing Courts, that the Hartford-Rudd contract terminated Pre-Petition.

On September 16, 1981, the same day as the Opinion below, the Departmental Disciplinary

Committee of the Supreme Court, State of New York, Appellate Division, formally dismissed a Complaint against Petitioner's counsel which had been referred to it for investigation by the Court of Appeals for the Second Circuit's Committee on Admissions and Grievances. The Disciplinary Committee's action, in dismissing the complaint voted in a sua sponte en banc Order of the Second Circuit dated March 21, 1979, recognized the good faith efforts of Petitioner's counsel in seeking to reverse the fraud and the injustice which was clear from the newly discovered evidence.

REASONS FOR GRANTING THE WRIT

I.

THE OPINION SOUGHT TO BE REVIEWED OVERLOOKS NEWLY DISCOVERED EVIDENCE SINCE THE FILING OF THE APPEAL WHICH CONCLUSIVELY ESTABLISHES RESPONDENTS' "FRAUD ON THE COURT," THEREBY PERPETUATING A FRAUD AND AN INJUSTICE IN CONTRAVENTION OF SUPREME COURT DICTA, AND REQUIRING THE EXERCISE OF THIS COURT'S RULE 19 POWERS OF SUPERVISION

In Reading Company v. Brown, 88 S.Ct. 1759 (1968), this Court indicated that certiorari will be granted where there is presented an important issue of first impression dealing with the administration of the bankruptcy laws. The case at bar, it is respectfully submitted, falls squarely within this criteria because it seeks to have the Supreme Court take judicial notice of events since the filing of the appeal below which conclusively establish a "fraud on the Court" in order to prevent a fraud and an injustice.

In Bryant v. Carleson,444 F.2d 353 (C.A.Cal, 1971), cert. denied 404 U.S. 967, the Court of Appeals took judicial notice of events since the taking of the appeal, including filings, motions and orders in the District Court and Court of Appeals, relevant administrative action, and decisions of a California court on a related matter.

This Court, as an issue believed to be of first impression in the Supreme Court, is respectfully asked to take judicial notice, under its Rule 19 powers of supervision, of newly discovered documentary evidence obtained on discovery in Respondents' pending Chapter 11 cases.[5] This evidence conclusively demonstrates Respondents continuing fraud on the Courts below, and further establishes the clearly erroneous nature of all of the Opinions below as a matter of law.

This Court in Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (1944), spoke of the duty of the Court to vacate and reverse an order which was predicated upon a fraud on the Court. The case at bar, it is respectfully submitted, seeks identical relief from a "fraud on the Court" perpetrated by a debtor-in-possession to defeat the rights of an administration creditor.

Even more important, the instant Petition seeks to have this Court exercise its equitable powers, not just to prevent a fraud, but to correct a gross injustice worked upon the Petitioner and her counsel. Pepper v. Litton, 308 U.S. 295 (1939).

As presented in the Statement of the Case, supra, the Court below has repeatedly held that it did not, and would not, take jurisdiction over the debtors Post-Confirmation of the Plan and Discharge on September 5, 1974. This is clear from the Court's sixth footnote to the Opinion below which reads as follows:

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[5] In re The Hartford Corporation, 80B 11090 (ER) and Wellington Print Works, Inc., 80B 11178 (ER)

> 6. Referring to the $3,346.71 in additional commissions paid to appellant during the Chapter XI arrangement for deliveries of vinyl pursuant to a settlement agreement following cancellation of the original Hartford Textile-Rudd Plastic Fabrics contract. This was fully explored and ruled upon in our decision of December 6, 1978. 588 F.2d at 874-75. There is nothing whatsoever in the payment of the $3,346.71 in additional commissions which even remotely supports Shuffman's fanciful claim of "post-confirmation jurisdiction". (Underscoring provided)

The newly obtained documentary evidence, however, conclusively establishes that the $3,346.71 was in fact earned on deliveries made after the Confirmation and Discharge, contrary to the erroneous holding of the Court below. The Court below was misled into affirming that which it specifically said it could not and would not affirm by the fraud perpetrated on the Court by Respondents and their counsel, who repeatedly assured the Court that no jurisdiction was taken for the Post-Confirmation period and that its numerous holdings were correct.

Clearly, the case at bar requires this Court's intervention under its Rule 19 powers of supervision in order to prevent a fraud and an injustice. In exercising that power, this Court is asked to determine a question believed to be of first impression in the High Court, to wit, how far the Court may go in taking judicial notice in order to insure the honest administration of justice.

II

THIS COURT MUST EXERCISE ITS RULE 19 POWERS OF SUPERVISION IN ORDER TO VINDICATE ITS OWN LEGITIMATE JURISDICTION, THE EXERCISE OF WHICH WAS ABUSED AND PREVENTED BY THE RESPONDENTS' CONTINUING "FRAUD ON THIS COURT" IN PRIOR PETITIONS

The pernicious effect of Respondents' "fraud on the Court" does more than just require reversal of the Opinion below. The fraud that permeates the entire Shuffman-Hartford litigation requires the extraordinary exercise of this Court's Rule 19 supervisory powers to vindicate the fraud and abuse of this Court's legitimate jurisdication which has resulted in a tragic injustice.

Respondents have attempted to change the "facts" at least four different times in their continuing efforts to defraud the Petitioner herein. As presented in the Statement of the Case, supra, Respondents started this litigation in the original Chapter XI's with a denial of any contractual liability to Petitioner. After succeeding, Respondents were forced to change their position and assert a "new" post-petition agreement with Petitioner at the subsequent rehearing, resulting in the Bankruptcy Court's Amended Order of August 26, 1977, when confronted with copies of Monthly Statements and commission checks voluntarily paid to Petitioner right up to the date of Confirmation and Discharge.

Respondents sleight of hand continued in the District Court and on into the Court of Appeals, wherein Respondents represented that the "fixed" terms of the alleged "new" contract provided for the payment of $3,346.17 in commissions on deliveries made during the Chapter XI's. This third change was necessary to conform to the District Court's and Court of Appeals erroneous interpretation of the Bankruptcy Court's Amended Order, and the various Courts further pronouncements that they could not affirm the payments of any monies for deliveries made after Confirmation and Discharge.

Respondents fourth change occured in the new Chapter 11's, when they were forced to show the derivation of the $3,346.17 by Bankruptcy Judge Edward J. Ryan, who could not comprehend the contradictory nature of the prior affirmances which had in fact provided for the payment of monies for the Post-Confirmation period. Respondents' admission that the reviewing Courts had in fact affirmed that which they said they could not and would not affirm goes to the heart of the "fraud on the Court" requiring this Court's extraordinary exercise of its Rule 19 supervisory powers.

Fixed terms of a contract cannot vary from Court to Court. It is obvious that the "new" contract was a fiction invented to defeat Petitioner's rights under her original contract, which Respondents failed to list in their Statements and Schedules. In addition, in order to make their fraud succeed, Respondents were forced to the extraordinary lengths of representing to the original reviewing Courts that the listed executory contract

with Rudd, upon which Petitioner's contract hinged, terminated pre-filing of the original Chapter XI petitions.

The law is clear that a broker's right to commission is unaffected by any subsequent modification of the contract between the parties to which the broker neither consents nor acquiesces in. 12 C.J.S. Sec. 64; 3A Corbin on Contracts, 1963 ed., Sec. 768; Oil Trading Associates, Inc., v. Texas City Refining, Inc., 303 F.2d 713 (2nd Cir., 1962); Frederick Zittel & Sons v. Schwartz, 192 A.D. 353 (N.Y. App. Div., 1920; Richmond-Garcia Oil Co. v. Coates, 17 F.2d 262 (1927); In the Matter of Steelships Corporation, 575 F.2d 128 (8th Cir., 1978).

Respondents, however, were able to consummate their fraud below and avoid liability by making an end run around these long standing precedents by inventing a new Post-Petition finders fee agreement extending beyond the period of the trust, and for which prior court approval was never obtained, which alleged "new" agreement itself violates Supreme Court dicta. Chicago Deposit Vault Co. v. McNulta, 153 U.S. 554, 561 (1894).

This Court is also asked to take judicial notice of evidence in Respondents pending Chapter 11's which further exascerbates and multiplies the fraud. Buoyed by the success of their initial "fraud on the Court," Respondents admitted in the new Chapter 11's to a repeat of the scenario in the original bankruptcy proceedings by which they hoped to defraud Petitioner of commissions still due even under the alleged "new" contract they belatedly claimed to have entered with Petitioner.

Respondents' testimony in the new Chapter 11's shows that even while performance was still due under the original Bankruptcy Court approved Compromise Agreement with Rudd, to which the alleged "new" agreement with Petitioner was tied, Respondents simply entered into yet another new contract with Rudd which simply cut out Petitioner again. Respondents actions were designed so as to deny Petitioner creditor status for the unpaid commissions under the original Bankruptcy Court approved Compromise Agreement with Rudd and the alleged "new" contract with Petitioner, and in a further effort to prevent Petitioner from airing once again her charges of "fraud on the Court."

Under the cases referring to brokers, supra, Respondents brazen repeat of their attempt to defraud Petitioner yet again of the commissions due under the alleged "new" agreement should entitle her to her full commission under her original contract with Respondents. This should have been the logical result stemming from the ratification and assumption of her original contract by virtue of the voluntary payments made up until Confirmation and Discharge and would have been but for the invention of the fictitious "new" contract with its constantly changing terms. Matter of Steelships Corporation, 575 F.2d 128 (8th Cir., 1978); 8 Collier on Bankruptcy, 14 ed., Sec. 6.32 (4); Accord: In re Wil-Low Cafeterias, Inc., 111 F.2d 83 (2nd Cir., 1940).

Respondents' "fraud on the Court" was the predicate for the Court below's original affirmance

reported at 588 F.2d 872 (1978), cert. denied 444 U.S. 870, reh. denied, 444 U.S. 975 (1979), and the rationale for all the subsequent Opinions referred to in the Opinion for which review is sought herein.

It is respectfully submitted on this Petition that this Court has a duty to vacate and reverse not only the Opinion below, but its denial of certiorari for the original Opinion reported at 588 F.2d 872 (1978), cert. denied 444 U.S. 870, reh. denied 444 U.S. 975 (1979) as well, in order to prevent a fraud and an injustice. Pepper v. Litton, supra.

The Rule 19 exercise of the extraordinary powers of supervision is clearly required in order to reverse Opinion below and prior Opinions obtained as a result of the debtor-in-possessions' original "fraud on the Court". That taint has unfortunately prevented the exercise of this Court's legitimate jurisdiction.

III

THE COURT BELOW DENIED PETITIONER HER FIFTH AMENDMENT GUARANTEE OF DUE PROCESS OF LAW BY ITS CLEARLY ERRONEOUS CATEGORIZATION OF THE APPEAL AS BEING TAKEN FROM A DENIAL OF REARGUMENT: IN SO DOING, THE COURT BREACHED ITS ARTICLE III DUTY BY FAILING TO ADDRESS THE MERITS OF THE APPEAL, REQUIRING REVERSAL OF THE OPINION BELOW

The Court below's categorization of the appeal as being taken from a denial of reargument, which the Court held to be a non-appealable order, was clearly erroneous as a matter of law. United States v. United States Gypum Co., et al., 333 U.S. 364 (1948). As a consequence of its error, the Court below denied Petitioner her Fifth Amendment guarantee of "due process of law" and breached its own Article III duty by failing to reach the underlying merits of Petitioner's appeal Case, et al. v. Los Angeles Lumber Co., 308 U.S. 106 (1939).

The original Notice of Appeal to the District Court, reprinted at Appendix A-29 infra, clearly denominates the Bankruptcy Court's original Order denying the Application for the Appointment of a Receiver to Administer Concealed Assets as being appealed from. The District Court, and Court of Appeals, were misled into categorizing the appeal as being from a denial of reconsideration based upon Respondents' repeated assertions that the identical issues had already been addressed in several of Petitioner's prior appeals.

This Court is asked to take judicial notice of the original Notice of Appeal to the District Court, which establishes the Opinion below to be clearly erroneous as a matter of law. Brown v. Board of Education, 344 U.S. 1 (1952); Putnam v. Day, 89 U.S. 60 (1874); and United States v. United States Gypum Co., et al., supra.

In failing to reach the merits of the appeal, the Court below denied Petitioner her Fifth Amendment guarantee of due process of law and breached its own Article III duty to fairly and impartially adjudicate the controversy before it. Equally important, however, is the fact that the Court below, predicated upon its error in denominating the appeal as being taken from reargument only, thus preventing it from reaching the merits, left standing an Order which contravenes the basic tenets of equity jurisprudence and violates Supreme Court dicta.

This Court, as long ago as 1939, established the principle that bankruptcy courts are courts of equity, and have continuing jurisdiction in order to prevent a fraud and an injustice. Pepper v. Litton, 308 U.S. 295 (1939). Moreover, it is well-settled that bankruptcy courts, as courts of equity, have continuing jurisdiction to administer concealed assets, even to the extent of reopening closed cases. Bank of Marin v. England, 385 U.S.99, 103 (1966); Bankruptcy Rule 515; and 11 U.S.C. §350.

In the case at bar, the Respondents deliberately omitted from their Statements and Schedules

four law suits pending against them and their officers, including a stockholders' derivative action charging, inter alia, fraud, mismanagement, waste and conversion. Significantly, the minority shareholders, who claim to be collectively majority stockholders, were never notified of the original Chapter XI proceedings. Their efforts to press their claims, when informed of the proceedings Post-Confirmation, were rebuffed by the Bankruptcy Court, and in the District Court upon appeal.

Based upon the representations of the Respondents and their counsel, the Court below was induced to hold that these minority shareholders claims had been dormant for sixteen years. This Court is asked to take judicial notice of events occurring simultaneously in Respondent's pending Chapter 11 cases, wherein the minority shareholders were not only pressing their claims, and were at the time of Respondents representations to the contrary, but have been offered $150,000.00 as part of the tentative out-of-court settlement. Bryant v. Carleson, 444 F.2d 353 (C.A. Cal., 1971), cert. denied, 404 U.S. 967 (1971).

Respondents further representations to the Court below that the identical issue of whether a receiver should be appointed to administer concealed assets had been previously adjudicated resulted in the Court's determination that the issue had been considered and rejected in its Opinion reported at 613 F.2d 384, (1979), cert denied 447 U.S. 907 (1980), when it had in fact not been.

The issue in that appeal was whether attorneys' fees may be revoked and sanctions imposed Post-Confirmation for the "fraud on the Court" in failing to list the aforementioned law suits in the Statements and Schedules and for other deliberate omissions and misrepresentations. By that time, however, Respondents had already succeeded in their initial "fraud on the Court" resulting in the Opinion reported at 588 F.2d 872 (1978), cert. denied, 444 U.S. 870, reh. denied, 444 U.S. 975 (1979), which taint was evident in the Court's later Opinions, including the one for which review is sought herein.

Supreme Court review is required to correct the pernicious results of the fraud and injustice which have denied Petitioner her right to due process of law and which have prevented the Courts, including this Court, from fulfilling their duties pursuant to Article III of the Constitution.

IV

THE PROVISIONS FOR DAMAGES AND COSTS ASSESSED AGAINST PETITIONER'S COUNSEL IN THE OPINION BELOW WERE A DIRECT CONSEQUENCE OF RESPONDENTS "FRAUD ON THE COURT"; WERE IMPOSED IN CONTRAVENTION OF THE ASSURANCES GIVEN BY THE DEPARTMENTAL DISCIPLINARY COMMITTEE THAT NO FURTHER LIABILITY WOULD ATTACH TO COUNSEL'S EFFORTS TO REVERSE THE FRAUD AND INJUSTICE; AND WERE FOUNDED UPON PREJUDICIAL ERRORS IN THE OPINION BELOW, THEREBY REQUIRING REVERSAL

The imposition of $5,000.00 in damages pursuant to Rule 38 of the Rules of Appellate Procedure and double costs pursuant to 28 U.S.C. §1912 (1976) assessed against Petitioner's counsel in the Opinion below are a direct result of Respondents continuing "fraud on the Courts" which has resulted in the myriads of Opinions which are clearly erroneous as a matter of law. (See Points I, II and III, supra.)

An example of the prejudice attendant upon Respondents' continuing fraud can be seen in Footnote 12 to the Opinion below, which reads as follows:

> 12. The bankruptcy court on at least two occasions has imposed sanctions on Shuffman in the instant bankruptcy proceedings. On January 10, 1979 that court fined him $250 for costs. On January 9, 1979 the same court held him in contempt

and on January 26, 1979 fined him $50 for such contempt. See 613 F.2d at 386.

This Court is asked to take judicial notice of the fact that these orders for sanctions and contempt were reversed upon appeal to the District Court. Brown v. Board of Education, 344 U.S. 1 (1952).

In addition, this Court is asked to take judicial notice once again of actions subsequent to the filing of the appeal, to wit, the Departmental Disciplinary Committee of the Supreme Court, State of New York, Appellate Division's dismissal of the disciplinary complaint against Petitioner's counsel voted pursuant to a sua sponte en banc Order of the Second Circuit dated March 21, 1979, and referred to the Departmental Disciplinary Committee for investigation pursuant to a further en banc Order dated May 7, 1979.[6]

The Departmental Disciplinary Committee was compelled to dismiss the complaint in the face of the newly discovered documentary evidence, including the Internal Memorandum referred to in the Statement of the Case, supra, which clearly established Respondents "fraud on the Court". The Committee, however, went further and assured Petitioner's counsel that no further liability would accrue based upon counsel's continued filings and efforts to overturn the prejudicial effect of Respondents "fraud on the Court".

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[6] In re David K. Shuffman, Court of Appeals Docket No. 79-8166

The Court below should have been judicially estopped from assessing damages and costs predicated upon the assurances of the Disciplinary Committee, which was acting as an arm of the Court below when conducting the investigation of Petitioner's counsel. Case v. Los Angeles Lumber Co., 308 U.S. 106 (1939); Putnam v. Day, 89 U.S. 60 (1864); Chicago Deposit Vault Co. v. McNulta, 135 U.S. 554 (1893); and 31 Corpus Juris Secundum, §1-5, 117-120.

The imposition of damages and costs in the case at bar in the face of the Departmental Disciplinary Committee's actions, serves no useful purpose but does have a chilling effect upon counsel's First Amendment guarantees of freedom of speech and expression and duties to his client under the Code of Professional Responsibility. The award of damages and costs also serves as an impediment to Petitioner's Sixth Amendment guarantee of her right to counsel in her struggle to correct the fraud and injustice perpetrated against her by Respondents "fraud on the Court".

In addition, the damages awarded appear to contravene the provisions of the Bankruptcy Act insofar as they apply to counsel fees. In 1974, Respondents counsel received their final fee award for all work in connection with the original Chapter XI's, which included the work to be done in connection with Respondents objection to Petitioner's claim. The work done in connection with the appeal below and the proceedings at bar are covered

by the 1974 final counsel fee award.

As such, Respondents should not have any damages to be recompensed. This Court is asked to take judicial notice of the testimony given in Respondents pending Chapter 11's, which establishes that Respondents' counsel have continued billing Respondents for work done in connection with the various Hartford related appeals in the original Chapter XI proceedings, despite the prohibition and apparent bar via the Final Fee Allowance in 1974, and the Bankruptcy Act's and United States Code's penalty provisions attendant therewith. Bryant v. Carleson, supra.

Clearly, the award of damages and double costs assessed against Petitioner's counsel is anathema to the fundamental concepts underlying the honest administration of justice, and must be vacated and reversed.

IMPORTANCE OF THIS PETITION

This petition presents a situation where the Court of Appeals for the Second Circuit has continued to determine federal questions inconsistent with the honest administration of justice as a result of a "fraud on the Court" by Respondents and their counsel, requiring the extraordinary exercise of this Court's Rule 19 powers of supervision in order to prevent a fraud and an injustice.

This pattern originated in the Court below's Opinion reported at 588 F.2d 872 (1978), cert. denied 444 U.S. 870, reh. denied, 444 U.S. 975 (1979), and has carried over into every other Opinion which has been issued over the last three years.

The crux of this Petition hinges on how far this Court will go in its efforts to insure the honest administration of justice. Petitioner respectfully submits that this Court has to go no further than taking judicial notice of documentary evidence in Respondents pending Chapter 11 cases obtained since the filing of the appeal below which conclusively establishes the Respondents' "fraud on the Court", to determine the necessity of the extraordinary exercise of this Court's supervisory powers under Rule 19.

Figures do not lie; but liars figure. The documentary evidence obtained in Respondents' pending Chapter 11's show that Respondents have attempted to change the fixed terms of the alleged "new" agreement

with Petitioner no less than four times in their continuing effort to defraud the Petitioner.

The bottom line establishes that there was no new contract entered into with Petitioner. The documentary evidence further establishes that the newest version of the supposedly fixed terms of the alleged "new" contract with Petitioner contradict the very findings and foundation upon which the Opinion below, and its precursors, rely for their legitimacy.

Once shorn of the fiction of the "new" contract with Petitioner, the inescapable conclusion is that Petitioner has been consistently denied "due process of law" as a result of the "fraud on the Court" which has interfered with and prevented the legitimate exercise of the various Courts' jurisdiction.

For without a "new" contract, and predicated upon Petitioner's original and only legitimate contract with Respondents, the Opinion below, and its precursors, would have had to have been decided differently. Indeed, without the fiction of a "new" contract, this Court may well have decided to grant the Petition for a Writ of Certiorari in Docket No. 79-178.

The importance of this Petition, as it affects the honest administration of justice, cannot be underestimated or separated from the aforementioned Petition. Therefore, reprinted here is the section entitled "IMPORTANCE OF THIS PETITION" from that Petition which was denied 444 U.S. 870, reh. denied, 444 U.S. 975 (1979).

IMPORTANCE OF THIS PETITION

This petition presents a situation where the Court of Appeals for the Second Circuit has determined federal questions (a) inconsistent with prior rulings of this Court; (b) in conflict with rulings of other Circuits; and (c) not previously determined by this Court:

(1) In Putnam v. Day, 89 U.S. 60 (1874), this Court determined that in equity proceedings a defendant is absolutely bound by its answer. Yet, the Second Circuit permitted Hartford to take a position inconsistent with its answer and Statement of Executory Contracts.

(2) The Second Circuit held that a court-approved compromise of a dispute over an executory contract listed on a debtor-in-possession's Statement of Executory Contracts constitutes a "new" contract. This holding, which reverses the Second Circuit's position taken In re Willow Cafeterias, Inc., 111 F.2d 83 (1940) is diametrically opposed to any rational interpretation of contract law (See, Corbin On Contracts, 1963 edition, Section 1268) and fairly presents to this Court a question never previously determined which ought to be determined by the Supreme Court.

(3) The Second Circuit held that the subsequent modification or cancellation of a

contract concluded between the principal and a party produced by a broker adversely affects the broker's right to his commission, where the broker neither consents thereto nor acquiesces therein. This holding is contrary to that of the Court of Appeals in Texas as reflected in Richmond-Carcia Oil Co. v. Coates, F.2d 262 (5th Cir., 1927) and known contract law Corbin On Contracts, 1963 edition, Section 768). As such, it presents to this Court a question of law never previously decided by the Supreme Court, which ought to be determined by this Court.

(4) The Second Circuit permitted a debtor-in-possession to enter into a contract under which it undertook to pay vast sums of money over a period of time extending far beyond the period of arrangement, without prior Court approval contrary to this Court's holding in Chicago Deposit Vault Company v. McNulta, 153 U.S. 554 (1894).

(5) The Second Circuit interpreted the jurisdiction of the Bankruptcy Court so as to preclude a full adjudication of a controversy involving the debtor-in-possession and two claimants who had submitted to the jurisdiction to the Court by filing proofs of claim, one of whom consented to a Court-approved compromise agreement involving a related contract and which dispute resulted in a new claim against the debtor, contrary to this Court's holding in Pepper v. Litton, 308 U.S. 295 (1939).

(6) The Second Circuit permitted the debtor-in-possession to accept the benefits of an executory contract, never disaffirmed, without accepting the burdens as well, contrary to this Court's holding in Hurley v. Atcheson, Topeka & Santa Fe Railway Company 213 U.S. 126 (1909).

(7) The Second Circuit permitted a debtor-in-possession to obtain Creditors' Committee and Court approval of an agreement compromising a dispute over a listed executory contract by an application which failed to reveal the effect which the compromise agreement would have on the broker who arranged the listed executory contract and the broker's probable claims arising therefrom, contrary to this Court's holding in Protective Committee, Etc. v. Anderson, 390 U.S. 414 (1968).

(8) The Second Circuit held that an expense arising out of a contract commitment of a debtor-in-possession, from which the debtor received value and to which it initially adhered is not an expense of administration, contrary to this Court's ruling in Reading Co. v. Brown, 391 U.S. 471 (1968).

(9) The Second Circuit held that a finding of fact that a listed executory contract terminated before the filing of the Chapter XI petition was not "clearly erroneous" as a matter of law, contrary to this Court's holding in United States v. United States Gypsum Co., et al., 333 U.S. 364 (1948).

(10) The Second Circuit held that it did not have a duty to vacate and reverse an order based upon a "fraud on the Court" perpetrated by the debtor-in-possession in order to defeat the rights of an administration creditor, contrary to this Court's holding in Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (1944).

(11) The Second Circuit held that the failure of a debtor-in-possession to list an executory contract on its Statement of Executory Contracts coupled with the bankruptcy court's failure to permit an evidentiary hearing did not deprive the claimant of substantial due process as a matter of law.

As such this case presents the ideal case for review of ambiguities in the administration of the bankruptcy laws.

It is respectfully submitted that the instant Petition presents the ideal case for a review of and test of the High Court's commitment and ability to insure the honest administration of justice for all.

CONCLUSION

Petitioner respectfully prays that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

DAVID K. SHUFFMAN
Attorney for the Petitioner

Dated: New York, New York
January 12, 1982

Appendix

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1341—September Term, 1980

(Argued May 20, 1981 Decided September 16, 1981)

Docket No. 81-5007

In re HARTFORD TEXTILE CORPORATION, OXFORD CHEMICALS, INC., and WELLINGTON PRINT WORKS, INC.,

Debtors,

ROSE SHUFFMAN, as Executrix of the Estate of OSCAR SHUFFMAN, deceased,

Defendant-Appellant,

—v.—

HARTFORD TEXTILE CORPORATION, OXFORD CHEMICALS, INC., and WELLINGTON PRINT WORKS, INC.,

Plaintiffs-Appellees.

Before:

MOORE, TIMBERS and MESKILL,

Circuit Judges.

Appeal from an order entered January 20, 1981 in the Southern District of New York, Abraham D. Sofaer, District Judge, affirming an order entered January 9, 1980 by Roy Babitt, Bankruptcy Judge, which denied appellant's motion to require the bankruptcy court to reconsider its order entered November 14, 1979 denying appellant's oral application for the appointment of a receiver in a Chapter XI proceeding which had been dismissed more than five years prior thereto and in which the bankruptcy court no longer had jurisdiction over the debtor's assets and affairs.

Affirmed, with double costs and $5000 damages assessed against appellant's attorney, David K. Shuffman, Esq.

BRUCE R. ZIRINSKY, BRAD E. SCHELER, and WEIL, GOTSHAL & MANGES, New York, N.Y., for appellees.

DAVID K. SHUFFMAN, New York, N.Y., for appellant.

PER CURIAM:

This is the latest in a series of meritless, frivolous appeals, motions and related proceedings[1] brought by Attorney

David K. Shuffman (hereinafter "Shuffman") purportedly on behalf of his mother, Rose Shuffman, as executrix of the estate of Oscar Shuffman (hereinafter "Appellant"), against Hartford Textile Corporation, Oxford Chemicals, Inc. and Wellington Print Works, Inc., three companies formerly in Chapter XI which now are part of The Hartford Corporation, a successor company which itself is the debtor in a pending Chapter XI proceeding.

The specific appeal presently before us is from an order entered January 20, 1981 in the Southern District of New York, Abraham D. Sofaer, District Judge, affirming an order entered January 9, 1980 by Roy Babitt, Bankruptcy Judge, which denied appellant's motion to require the bankruptcy court to reconsider its order entered November 14, 1979 denying appellant's oral application for the appointment of a receiver in a Chapter XI proceeding which had been dismissed more than five years prior thereto and in which the bankruptcy court no longer had jurisdiction over the debtors' assets and affairs.

For the reasons below, we affirm, with double costs and $5000 damages assessed against appellant's attorney, David K. Shuffman, Esq.

Appellant's underlying claims[2] stem from a contract which appellant's decedent, Oscar Shuffman, entered into with appellee Hartford Textile Corporation, under the terms of which he was entitled to a finder's fee based on the percentage of deliveries of vinyl to Hartford Textile by Rudd Plastic

Fabrics Corporation. Such deliveries were to be made pursuant to a separate contract between Hartford Textile and Rudd. Appellant's multiplicitous claims boil down essentially to two: first, that the Oscar Shuffman contract continued in effect after the filing of the bankruptcy petition and the cessation of deliveries under the Hartford Textile-Rudd contract: and, second, that the determination of appellees' bankruptcy estate should have included purported assets which appellant assert should have been recovered as the result of a series of shareholders' derivative actions brought by certain members of the Magid family. These shareholders' actions were commenced in 1965, eight years prior to the filing of the Chapter XI petition. They had been dormant for eight years prior to the Chapter XI proceeding and they have remained dormant ever since--a total of sixteen years.

Our Court on December 6, 1978 squarely rejected the first claim of continuing contractual liability. 588 F.2d 872. As for the second claim--that purported assets should have been included in the bankruptcy estate--our Court on December 27, 1979 squarely held that the bankruptcy court's order denying reargument on the merits of that claim was not an appealable order. 613 F.2d at 385.

It is in connection with the second essential claim referred to above, as to which our Court more than a year and a half ago ruled as stated above, that the instant appeal has been taken.

The order which is the subject of the instant appeal came about as follows. On

November 14, 1979, Shuffman entered the courtroom of the bankruptcy court where a hearing was being held by Judge Babitt on a motion to which neither Shuffman nor his client was a party.[3] Without having filed any motion papers and without having given any notice whatsoever to his adversaries (the debtors), Shuffman made an oral application to Judge Babitt for the appointment of a receiver to take control of the assets and affairs of the Hartford Textile Corporation in a Chapter XI proceeding which had been dismissed more than five years prior thereto, on September 5, 1974, at which time the plan of arrangement was confirmed and the debtors were granted a discharge in bankruptcy. Judge Babitt promptly and unequivocally informed Shuffman that "the (Bankruptcy Court) has no appropriate jurisdiction.... This case was confirmed years ago. The property is revested in the debtor." Shuffman's oral application was denied the same day it was made--on November 14, 1979--for lack of jurisdiction. See then applicable Section 367 of the Bankruptcy Act, 11 U.S.C. §767 (1976) (repealed in part by Bankruptcy Reform Act of 1978; current version at 11 U.S.C. §1141(a) (Supp. III 1979)).

On November 20, 1979, Shuffman filed a motion in the bankruptcy court for reargument of the denial of his application for the appointment of a receiver, alleging in his supporting affidavit that "(i)t is obvious that the stockholders' derivative action which was deliberately omitted from the Petitions and Schedules is an asset of the debtors, and as such, belongs to creditors."

Whether "obvious" or not, our Court has ruled that the order of the bankruptcy court denying reargument on the merits of that claim clearly was not an appealable order. 613 F.2d at 385.

On January 9, 1980, the bankruptcy court denied Shuffman's motion for reargument. Shuffman thereupon appealed to the district court from the orders of the bankruptcy court of November 14, 1979 and January 9, 1980 denying, respectively, his oral application for the appointment of a receiver and his motion for reargument.

From the district court's order of January 20, 1981 dismissing Shuffman's appeal with costs, the instant appeal was taken.

II.

The utter lack of merit to this frivolous appeal, in light of the controlling provisions of the Bankruptcy Act and in the context of our prior decisions in this bankruptcy proceeding, normally would require at most a one sentence order affirming the order of the district court with costs. In view of the sanctions which we impose in Section III of this opinion, however, it is appropriate here to make clear the meritless, frivolous nature of this appeal, particularly in view of the stream of frivolous proceedings which have preceded the instant appeal.

The district court held that the bankruptcy court correctly ruled that it did not have jurisdiction to reconsider its denial of Shuffman's oral application for the appointment of a receiver in a Chapter XI proceeding which had been dismissed more than five years earlier. Shuffman v. Hartford Textile Corp., Docket No. 80 Civ. 4390 (ADS), Arrangement Nos. 73 B 674-676 (S.D. N.Y. January 20, 1981). The correctness of that holding is the only issue before us on this appeal. The chief significance of that issue[4] in the context of the instant appeal is what appears to be the inability of Shuffman to accept repeated determinations by the bankruptcy court, the district court and this Court adverse to him on that issue, as we pointed out on an earlier appeal. 613 F.2d at 388.

Neither in his brief nor in oral argument on the instant appeal has Shuffman even attempted to address the only issue before us, referred to above.[5] The reason for his avoiding that issue is obvious: we repeatedly have held on prior appeals in this bankruptcy proceeding that the bankruptcy court's order denying reargument clearly is not appealable. 588 F.2d at 876; 613 F.2d at 385. In each instance, we directed Shuffman's attention to the controlling authority in this Circuit. In re Brendon Reilly Associates, Inc., 372 F.2d 235, 238 (2 (2 Cir. 1967).

Totally ignoring the only issue on this appeal, as well as the controlling authority and the law of the case which is squarely

against him, Shuffman has attempted to mask the frivolity of his appeal by claiming that, since the bankruptcy court took what Shuffman characterizes as "post-confirmation jurisdiction" over appelees' bankruptcy estate,[6] it necessarily now must take "post-confirmation jurisdiction" over the estate for the purpose of including the purported assets he thinks should have been recovered in the shareholders' derivative actions which have been dormant for sixteen years.

Aside from the unsupported premise for this frivolous claim, it also is in plain contravention of the conclusive effect of Section 367 of the Bankruptcy Act, II U.S.C. §767 (1976) (repealed in part by Bankruptcy Reform Act of 1978; current version at 11 U.S.C. § 1141(a) (Supp. III 1979)), to which Shuffman's attention has been directed repeatedly by the bankruptcy court, the district court and this Court. In short, the bankruptcy courts jurisdiction does not survive five years after confirmation of the plan and dismissal of the case. And an order of the bankruptcy court denying reargument as to its jurisdiction is not appealable.

We affirm in all respects Judge Sofaer's order of January 20, 1981 which affirmed, and dismissed with costs the appeal from, the order of the bankruptcy court of January 9, 1980 which denied reargument of Shuffman's prior oral application for appointment of a receiver.[7]

III.

Having held that this appeal is frivolous and wholly lacking in merit, we turn finally to the matter of sanctions to be imposed. In light of the authorities set forth below, and under all the circumstances of this case, we order that double costs in this Court and $5,000 damages be awarded to appellees and that they be assessed in the first instance against David K. Shuffman, Esq., individually and as attorney for appellant.[8]

Our authority to assess damages,[9] as well as double costs,[10] is clearly provided by statute and the governing rule.

We have not hesitated to exercise that authority in appropriate cases.[11] Indeed, in at least two prior Shuffman appeals in this Court in the instant bankruptcy proceeding, we have assessed double costs against appellant, Shuffman's client, after finding the appeals to be frivolous. 648 F.2d at 814; 613 F.2d at 386.[12]

Moreover, we repeatedly have warned Shuffman that continuation of his repetitive, meritless, frivolous appeals, motions and related proceedings will compel us to impose more severe sanctions. 588 F2d. at 876 n. 3; 613 F.2d at 386; 613 F.2d at 388-91; 648 F.2d at 814.[13]

Despite the sanctions heretofore im-

posed and our repeated warnings to Shuffman over a period of nearly three years, his stream of repetitive, meritless and frivolous filings has continued unabated. [14] In our December 6, 1978 decision disposing of four appeals, we noted that Shuffman had filed at least twenty-five motions, many meritless and many repetitive. 588 F.2d at 876 n. 3. A year later, in one of our December 27, 1979 decisions disposing of three appeals, we found that Shuffman had "more than doubled" his "output of meritless, frivolous filings" since our December 6, 1978 decision, and we set forth in an appendix some twenty-five such meritless, frivolous filings. 613 F. 2d at 386-87. In our most recent Shuffman decision, on May 15, 1981, we observed that that frivolous appeal was "a continuation of the meritless and repetitious filings" noted in our two prior opinions referred to above. 648 F.2d at 814. As of the date of the instant opinion, by actual count, we find that Shuffman during the past three years has inundated this Court with more than a hundred motions, petitions, requests, appeals and other filings, virtually all of which have been utterly frivolous, totally devoid of merit, obviously repetitive and demonstrably vexatious. [15]

In short, having held that the instant appeal is meritless and frivolous, we conclude, in light of the flood of similar prior meritless and frivolous appeals and related matters pursued by Shuffman in this bankruptcy proceeding, that "the situation here is one of those 'highly unusual' instances which permit the imposition of sanc-

tions under Rule 38 because of a 'clear showing of bad faith'." Fluoro Electric Corporation v. Branford Associates, supra note 9, at 326, quoting West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1092 (2 Cir.), cert. denied, 404 U.S. 871 (1971). And we further conclude that, since it is Shuffman individually and as the attorney for appellant who is responsible for the unreasonable prolongation of this litigation by his pursuit of meritless and frivolous appeals, he accordingly is the proper person against whom to assess double costs and damages as ordered below. Browning Debenture Holders' Committee v. Dasa Corp., supra, 605 F.2d at 40-41; Acevedo v. Immigration & Naturalization Service, supra, 538 F.2d at 921.[16]

Our decision on this appeal is a stern warning that the United States Courts are not powerless to protect the public, including litigants who appear before the Courts, from the depredations of those such as Shuffman who hold themselves out as attorneys but who abuse the process of the Courts to harass and annoy others with meritless, frivilous, vexatious or repetitive appeals and other proceedings.

We order that the mandate issue forthwith; that the judgment of this Court include the provisions for double costs and damages as ordered above; that execution on the judgment of this Court for damages issue forthwith; and that execution on the judgment of this Court for costs issue within ten days of the date of the taxation of costs according to law.

Affirmed, with double costs and $5000 damages against appellant's attorney in this Court, David K. Shuffman, Esq.

FOOTNOTES

1/ E.g., Shuffman v. United States, 648 F.2d 812 (2 Cir. 1981); Shuffman v. Hartford Textile Corp., 628 F.2d 1345 (2 Cir.), cert. denied, 446 U.S. 909 (1980); Shuffman v. Hartford Textile Corp. 613 F.2d 388 (2 Cir.) 1979); Shuffman v. Hartford Textile Corp., 613 F.2d 384 (2 Cir. 1979) (three appeals), cert. denied, 447 U.S. 907 (1980); Shuffman v. Hartford Textile Corp., 588 F.2d 872 (2 Cir. 1978) (four appeals), cert. denied, 444 U.S. 870 (1979).

Shuffman has had an unblemished record of total failure in this Court on every appeal, motion and related proceeding, with one exception: one of our decisions of December 27, 1979, after noting that Shuffman's activities to date had "grossly abused the judicial process", remanded the case to the district court for a hearing, after notice, on the question whether Shuffman, individually and in his capacity as an attorney, should be enjoined from filing further papers in this bankruptcy case. 613 F.2d at 391.

2/ The factual background of appellant's claims and the bankruptcy proceeding is fully set forth in our opinion of December 6, 1978, 588 F.2d 872, and will

be referred to here only to the extent necessary to an understanding of the issue presented by the instant appeal.

3/ The motion being heard by Judge Babitt on November 14, 1979 was one by Thomas H. Magid, as beneficiary and executor of the estate of Eugene Magid, seeking sanctions against the attorneys for the debtors in the Hartford Textile Corporation Chapter XI proceeding. The motion was denied on November 14, 1979 by Judge Babitt on the ground that the bankruptcy court no longer had jurisdiction over the debtor's assets and affairs. This order, and a subsequent one denying reargument, upon appeal to the district court, were affirmed in an opinion and order of Judge Pollack on the ground that the bankruptcy court under Section 367 (4) of the Bankruptcy Act no longer had jurisdiction, Magid v. Hartford Textile Corp., 80 Civ. 4632 (S.D.N.Y.) November 13, 1980).

Shuffman previously had been denied virtually the same relief sought by Magid at the hearing before Judge Babitt on November 14, 1979. The order denying Shuffman's motion was entered December 8, 1978 and subsequently was affirmed by the district court.

4/ Underlying that issue, of course, is Shuffman's oft-rejected claim, referred to above, that appellees' bankruptcy estate, which was closed in 1974, should have included purported assets he thinks should have been recovered in the shareholders' derivative actions commenced by members of the Magid family in 1965 and which have been dormant ever since.

5/ Instead of addressing the merits of the only issue before us on this appeal, Shuffman has continued his tactic of attempting to divert attention from the merits of the issue by engaging in such vituperation as "this Court has made so many stupid errors" and "(t)he emasculation of the integrity of the Court and the way it prostitutes the administration justice (sic) is vividly recreated .... "(Shuffman Brief at 5).

In ruling on the merits of this instant appeal, we draw the veil of charity over such vituperation by a member of the bar of this Court. We deal with it more explicitly in Section III of this opinion, infra.

6/ Referring to the $3,346.71 in additional commissions paid to appellant during the Chapter XI arrangement for deliveries of vinyl pursuant to a settlement agreement following cancellation of the original Hartford Textile-Rudd Plastic Fabrics contract. This was fully explored and

ruled upon in our decision of December 6, 1978. 588 F.2d at 874-75. There is nothing whatsoever in the payment of the $3,346.71 in additional commissions which even remotely supports Shuffman's fanciful claim of "post-confirmation jurisdiction".

7/ Judge Sofaer's order was based on two grounds: (1) the correctness of the bankruptcy court's ruling that it lacked jurisdiction, and (2) the possible availability of relief to appellant (assuming arguendo that appellant's motion was meritorious and that the bankruptcy court had jurisdiction to entertain it) in a new Chapter XI proceeding commenced July 14, 1980 by The Hartford Corporation (which includes its Oxford Division, the successor to Hartford Textile Corporation and Oxford Chemicals, Inc.) a proceeding in which Wellington Print Works, Inc., an affiliate of The Hartford Corporation, filed a separate petition on July 28, 1980, 80 B 11090 (ER); 80 B 11178 (ER) -- thus rendering moot appellant's instant motion in the bankruptcy court. As a matter of fact, on March 24, 1981 -- three days before his brief was filed in this Court on the instant appeal--Shuffman filed motions in the new Chapter XI proceeding in the bankruptcy court seeking orders (1) appointing a trustee and (2) disqualifying attorneys.

We affirm on both grounds of Judge Sofaer's order of January 20, 1981.

And we note that long before the notice of appeal in the instant case was filed on February 19, 1981 and the appeal was argued on May 20, 1981, Shuffman was aware of the pendency of the new Chapter XI proceeding.

8/ If appellees encounter any difficulty in executing the judgment for double costs and damages against Shuffman individually and as attorney for appellant, they may apply to this Court for modification of the judgment in that respect.

9/ Fed.R.App.P. 38 provides: "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

In construing Rule 38 in Fluoro Electric Corporation V. Branford Associates, 489 F.2d 320, 326 (2 Cir. 1973), we said:

> "Rule 38 is not premised on a showing of delay in prosecuting an appeal (Advisory Committee's Note to Rule 38; 9 Moore, Federal Practice 4251), although for a simple breach of contract case there has been inordinate delay here in satisfying the judgment. Rather the determination is one of doing justice between the parties, of penalizing a

party for unnecessarily wasting the time and resources of the court. NLRB v. Smith & Wesson, 424 F.2d 1072 (1st Cir., 1970).

"Here the defendant has prosecuted three appeals to this court, in addition to the numerous post-trial motions it has filed here and in the district court. In none of these appeals was there a pretense to any ground for appeal other than the claim that the judgment was against the wrong entity. Such an appeal was particularly unjustified in the case of the third appeal, in relation to which these damages are specifically sought. Rule 38 was designed to penalize litigants for just such tactics as these and to compensate those who have been put to the expense of answering such wholly frivolous appeals. NLRB v. Smith & Wesson, supra; Oscar Gruss & Son v. Lumbermens Mutual Casualty Co., 422 F.2d 1278 (2nd Cir., 1970); Griffin Wellpoint Corp. v. Munro-Langstroth, Inc., 269 F.2d 64 (1st Cir., 1959)."

10/ 28 U.S.C. § 1912 (1976) in relevant part provides: "Where a judgment, is affirmed by....a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.."

11/ E.g., Browning Debenture Holders' Committee v. Dasa Corp., 605 F.2d 35, 40-41 & 40 n. 5 (2 Cir. 1978) (double costs and $2500 damages assessed against appellant-attorney, who also was attorney for another appellant, the attorney having pursued nine meritless appeals and petitions for mandamus during a six-year period); Der-Rong Chour v. Immigration and Naturalization Service, 578 F.2d 464, 467-69 (2 Cir.1978), cert. denied, 440 U.S. 980 (1979) (double costs and $1000 damages assessed against petitioner and his attorney where "(t)he petition appears to represent one more step in an outrageous abuse of civil process through persistent pursuit of frivolous and completely meritless claims"); Acevedo v. Immigration & Naturalization Service, 538 F.2d 918, 919-21 (2 Cir. 1976) (double costs assessed against attorney where petition for review was found to be "utterly frivilous and completely lacking in any merit"); Fluoro Electric Corporation v. Branford Associates, supra note 9, at 326 (costs and $4500 damages assessed against appellant which prosecuted three wholly frivolous appeals and numerous post-trial motions in this Court and in the district court); Oscar Gruss & Son v. Lumbermens Mutual Casualty Co., 422 F.2d 1278, 1284-85 (2 Cir. 1970) (additional 4% interest on judgment, double costs, and $7500 attorney's fees assessed against appellant "(i)n view of

the superfluity of issues on appeal, the frivolity of almost all of them, and the briefing of many in a manner that simply ignored the abundant evidence"). See Bankers Trust Co. v. Publicker Industries, Inc., 641 F.2d 1361, 1368 (2 Cir. 1981) (double costs and $10,000 damages assessed against appellant and its attorney, with provision that, if appellee's expenses other than costs of appeal but including attorneys' fees are less than $10,000, such sum shall be the amount of damages assessed); Bank of Canton, Ltd. v. Republic National Bank of New York, 636 F.2d 30, 31 (2 Cir. 1980) (double costs and $5000 damages assessed against appellant, or, in lieu of $5,000 damages, appellee's expenses other than costs of appeal but including counsel fees if such expenses are less than $5,000).

12/ The bankruptcy court on at least two occasions has imposed sanctions on Shuffman in the instant bankruptcy proceedings. On January 10, 1979 that court fined him $250 for costs. On January 9, 1979 the same court held him in contempt and on January 26, 1979 fined him $50 for such contempt. See 613 F.2d at 386.

13/ For example, on December 6, 1978, in our first written opinion disposing of four of Shuffman's frivolous appeals, we warned (588 F.2d at 876 n.3):

"Appellant's counsel has filed at

> least twenty-five motions in the course of these proceedings. Many were meritless and many repetitive. As a result, the costs of the proceedings have been increased so unreasonably and vexatiously as to warrant consideration by this Court of an order requiring the attorney to satisfy personally the excess costs. See 28 U.S.C. §1927. We refrain from issuing such an order at this time only because counsel is a young man representing his widowed mother. In so doing, we in no way condone the course of conduct that counsel has pursued in this matter."

A year later, on December 27, 1979, we further warned (613 F.2d at 386):

> "We would be remiss if we contined much longer to allow valuable time to be diverted from the legitimate work of the court to the frivolous motions and appeals of Shuffman. We consider the present appeal, as well as those in Nos. 79-5036 and 79-5044, to be entirely frivolous, and we award appellees double their costs in connection with these matters. 28 U.S.C. § 1912 (1976); Fed.R.App.P. 38. We further advise Shuffman and her attorney that any further frivolous, vexatious or repetitious motions may well result in the Shuffmans' being ordered to show cause why they should not

be enjoined from filing any further papers with this Court, with whatever exceptions may be appropriate, in connection with the Chapter XI proceeding underlying these appeals." (footnote omitted)

14/ As noted earlier, however, his focus has shifted from any pretense of addressing the substance of his Chapter XI claims to sheer venomous, vexatious and wholly unfounded charges against his opposing counsel and various judges. 613 F.2d at 386 n.3.

15 / This count includes only filings in our Court.

The Supreme Court has not been spared Shuffman's production. During this period it uniformly has denied Shuffman's various petitions more than a dozen times. It denied certiorari with respect to two of our published Shuffman decisions: 613 F.2d 384 (1979), cert. denied, 447 U.S. 907 (1980); 588 F.2d 872 (1978), cert. denied, 444 U.S. 870 reh. denied, 444 U.S. 975 (1979). And it has declined to review our unpublished Shuffman orders in the following reported actions: cert. denied, 101 S.Ct. 321 (1980) (Docket No. 80-288; review sought with respect to 2 Cir. Docket No. 79-5060); cert. denied, 446 U.S. 909 (1980) (Docket No. 79-1338); cert. denied, 444 U.S. 1080, reh. denied, 445 U.S. 973 (1980) (Docket No. 79-1001; review sought with respect to 2 Cir. Docket No. 79-5008); cert. denied, 444 U.S.

1078, reh. denied, 445 U.S. 973 (1980) (Docket No. 79-942; review sought with respect to 2 Cir. Docket No. 79-5005); cert. denied, 444 U.S. 1078, reh. denied, 445 U.S. 973 (1980) (Docket No. 79-918; review sought with respect to 2 Cir. Docket No. 78-5055); motion denied, 444 U.S. 1011, reh. denied, 445 U.S. 912 (1980) (Docket No. 79-681); cert. denied, 439 U.S. 835 (1978) (Docket No. 77-1812).

And of course Shuffman's filings in the district court and the bankruptcy court during this period have been countless.

16/ The sanctions imposed by us today upon attorney Shuffman are not intended to influence, nor have we been influenced by, any disciplinary proceedings--past, pending or future--instituted against this attorney as the result of his persistent frivolous appeals and related proceedings. See ABA Code of Professional Responsibility, EC 7-4; In re Bithoney, 486 F.2d 319 (1 Cir. 1973).

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 20th day of October, one thousand nine hundred and eighty-one.

In the Matter of

HARTFORD TEXTILE CORPORATION, OXFORD CHEMICALS, INC., WELLINGTON PRINT WORKS, INC.,
Debtors.

----------x

ROSE SHUFFMAN, As Executrix of the Estate of OSCAR SHUFFMAN,

Defendant-Appellant, 81-5007

v.

HARTFORD TEXTILE CORPORATION, OXFORD CHEMICALS, INC., WELLINGTON PRINT WORKS, INC.,

Plaintiffs-Appellees.

----------x

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Rose Shuffman, as executrix of the Estate of Oscar Shuffman,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED..

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ A. Daniel Fusaro
A. Daniel Fusaro
Clerk

by Francis X. Gidnhart
Chief Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re	
HARTFORD TEXTILE CORPORATION, OXFORD CHEMICALS, INC., WELLINGTON PRINT WORKS, INC., Debtors.	MEMORANDUM AND ORDER
	80 Civ.4390 (ADS)
ROSE SHUFFMAN, as Executrix of the Estate of Oscar Shuffman, Appellant,	Arrangement Nos 73 B 674-676
-against-	
HARTFORD TEXTILE CORPORATION, OXFORD CHEMICALS, INC., WELLINGTON PRINT WORKS, INC., Appellees.	

ABRAHAM D. SOFAER, D.J.:

This appeal is from a ruling of Bankruptcy Judge Babitt denying a motion to reconsider his denial of an oral application for the appointment of a receiver. Judge Babitt advised that he lacked jurisdiction, and that the relief could be obtained in state court. That determination was within Judge Babitt's authority to make. Moreover, an application of this sort could now be brought in the bankruptcy court under a case now pending, commenced by the Hartford Corporation, 80 B 11090 and 80 B 11178 (ER).

The decision of Judge Babitt is affirmed, and the appeal is dismissed with costs.

SO ORDERED.

Dated: New York, New York
January 20, 1981.

/s/ ABRAHAM D. SOFAER
ABRAHAM D. SOFAER
United States District Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

In the Matter of :

HARTFORD TEXTILE CORPORATION :
OXFORD CHEMICALS, INC.,
WELLINGTON PRINT WORKS, INC., :

Debtors. :

----------x

THE COURT: All of the motions are denied.

...

There are lots of things in life that I don't understand, but as I view the law, as I see my jurisdiction it is not robust enough to do all of the things that you want me to do. That is all I am doing.

...

The application is denied for the reasons described on the record.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN THE MATTER	:	
-of-	:	ARRANGEMENT NUMBERS:
HARTFORD TEXTILE CORPORATION,	:	73 B 674
OXFORD CHEMICALS, INC.,	:	73 B 675
WELLINGTON PRINT WORKS, INC.,	:	73 B 676
Debtors.	:	
ROSE SHUFFMAN, as Executrix of the ESTATE OF OSCAR SHUFFMAN,	:	NOTICE OF APPEAL TO DISTRICT COURT
Appellant,	:	
-against-	:	
HARTFORD TEXTILE CORPORATION, OXFORD CHEMICALS, INC., WELLINGTON PRINT WORKS, INC.,	:	
Appellees.	:	

ROSE SHUFFMAN, as Executrix of the ESTATE OF OSCAR SHUFFMAN, the Appellant, Appeals to the District Court from the Order dated November 14th, 1979, by the HON. ROY BABITT, Bankruptcy Judge, denying her Application for the Appointment of Receiver, and the subsequent Order dated January 9th, 1980, denying Rehearing of said Application.

The parties to the Orders Appealed from, and the names and addresses of their respective attorneys are as follows:

DAVID K. SHUFFMAN
Attorney for Claimant,
ROSE SHUFFMAN, as Executrix
of the ESTATE OF OSCAR SHUFFMAN
14 East 60th Street
New York, New York 10022

WEIL, GOTSHAL & MANGES
Attorneys for Debtors
767 Fifth Avenue
New York, New York 10022

Dated New York, New York
January 17th, 1980

/s/ DAVID K. SHUFFMAN
DAVID K. SHUFFMAN